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In the New York Court of Appeals.

JOHN C. SMITH *vs.* WILLIAM COUNTRYMAN.

A. made an executory contract for the sale of goods to B. In an action brought by the vendee (B.) against the vendor (A.) to recover damages for the non-performance of the contract, A. established by way of defence, that B. falsely and with fraudulent intent, and as an inducement for A. to enter into the contract, represented that he had purchased goods of like quality, at the same price, of one C., a person who was acquainted with their value, and in whose judgment A. placed confidence. He also showed that he sold the goods to B. at a stipulated price, relying upon the false statement. *Held*, on this state of facts, that the plaintiff could not recover.

The vendor under such circumstances had a right to rely upon the vendee's statements without making inquiry of C. as to their truth.

The false statement was material to the contract. The rule laid down by Mr. Parsons, in his work on Contracts, approved: "If the fraud be such that, had it not been practised, the contract would not have been made, or the transaction completed, then it is material to it."

It is immaterial in such a case that the vendee agreed to pay the market price on the day of sale. If the contract was induced by fraud, the fraud is a complete defence to an action brought to recover damages for a failure to fulfil the executory contract.

The practice of raising questions of law at the circuit by a motion to strike out the defendant's answer, disapproved as contrary to the New York Code. The question should be presented either by a proper motion before the trial or by demurrer.

The opinion of the Court was delivered by

DAVIES, J.—This action is to recover damages for the breach of a contract to deliver a quantity of hops. The defendant agreed in writing with one H. R. Wood, to sell and deliver to him at the railroad depot at Fort Plain, all his crop of hops for the year 1860, put up in bales and delivered in good merchantable order, on the 20th of October in that year. Wood was to receive and pay for the hops 12½ cents per pound. The defendant's crop that year amounted to 3409 pounds. Wood was ready and willing to receive and pay for them, at the time and place agreed upon. The defendant neglected or refused to deliver them. Such hops were proved to have been worth, at the time they were to be delivered, 30 cents a pound, and the difference between the contract price agreed to be paid for them and the value at the time and place of delivery was $596.57, which the plaintiff claimed as damages for the breach of the contract.

The contract had been assigned to the plaintiff. The defendant set up by way of defence, in his second answer, that at the time of making the contract he was ignorant of the price of hops and reluctant to make the agreement. That Wood represented to him, that he, Wood, had purchased the crop of one Henry Elwood, a large and experienced hop-grower, at twelve and one-half cents per pound, and that he, the defendant, believing such statement, and having faith and confidence in the sagacity, prudence, and judgment of Elwood, entered into such agreement. He then alleges that the statement of Wood, that he had purchased Elwood's hops, was false and fraudulent, was made to deceive and defraud the defendant, and that by such false and fraudulent representations, he, the defendant, was actually deceived and induced to enter into such agreement, which was very disadvantageous, as hops were then worth more than twelve and one-half cents per pound, and that immediately thereafter, there was a great rise in the price of hops. On the trial the agreement was proved; the price of hops at the time the delivery was to be made by the terms of the agreement, was 28 to 30 cents per pound. The agreement bore date August 14th; the price of hops on that day was shown to be from 12 to 12½ cents per pound. Upon this proof the plaintiff rested his case, and the defendant moved for a nonsuit, which was denied by the court, and the defendant's counsel excepted. The plaintiff then moved to strike out the second ground of defence above stated, for the reasons, that the facts therein did not constitute a fraud, and that if the representations were made as set forth in the answer, they were immaterial and constituted no defence to the action. The court denied the motion, and the plaintiff excepted. The defendant was then permitted to prove, and did prove, the facts as set forth in the answer, except the averment therein, that at the time of the execution of the agreement, hops were worth more than twelve and a half cents per pound, by himself and two other witnesses named Miller and Crankhite; and it also appeared from their testimony that, at the time of the negotiation, Wood showed the defendant his book, wherein he had entered several contracts made by him with hop-growers for their crops at twelve and one-half cents per pound. That Elwood's name was not on the book among those with whom contracts had been made. Wood was also sworn, and testified that he told defendant he expected to purchase Elwood's crop of hops, and it

was admitted on the trial that Wood had not purchased any hops of Elwood. The plaintiff moved to strike out the evidence given by the defendant and Miller and Crankhite, so far as the same relates to the representations made by Wood of the purchase of Elwood's hops, as being immaterial and constituting no defence to the action, which motion was denied and the plaintiff excepted. The defendant had testified that he said to Wood, that if what he, Wood, had said was so, in regard to Elwood's hops, he would enter into the contract with him. The defendant then added, "I did believe the representations made that he had purchased Elwood's hops." This answer was objected to by the plaintiff's counsel, as improper and immaterial, but the objection was overruled, and the plaintiff's counsel excepted. The defendant then testified without objection, that he entered into the contract relying on that representation, and that soon afterwards he ascertained its falsity.

The jury found a verdict for the defendant, and judgment thereon was affirmed at the General Term.

The three exceptions taken by the plaintiff on the trial to the rulings of the court, present the only questions arising for the consideration of this court, upon this appeal.

If the new matter set up by the defendant, as constituting a defence, were sham or irrelevant, it was the duty of the plaintiff to have moved on notice to strike it out. Code, § 152. If the new matter did not upon its face constitute a defence, it was the duty of the plaintiff to have demurred to it. Code, § 153. The practice resorted to in this case, to correct the pleadings by motion at the trial, is not warranted by the Code, and should not be encouraged. The plaintiff in substance, by his motion to strike out the second ground of defence, admitted the allegations of the answer, and the question was presented to the court in the same form as if he had demurred to the answer. A moment's consideration will show how dangerous and inconvenient it is to reserve questions of law for argument and decision at the Circuit. But assuming the question was properly raised there, then it is to be considered whether the new matter set up in the answer upon its face constituted a defence to the action. And the question to be decided is in substance the same, whether it is put on the motion to strike out that defence or upon the motion to strike out the testimony which was given to establish it. In the first place, it is to be borne in mind that the plaintiff in this action is seeking

to enforce an executory contract, made and entered into by the defendant, as conceded by him, upon false and fraudulent representations made by the plaintiff's assignor, to induce him to make the same, and upon which it was admitted he, the defendant, relied. The statement of the proposition would seem sufficient to suggest the answer which the law should make. In the aspect we are now regarding the case, we are to take the statements of the defendant's answer as true. They are that he was ignorant of the price of hops, and was reluctant to make the agreement with Wood, the plaintiff's assignor: that Wood, to induce the defendant to sell him his hops and enter into the agreement, represented that he had purchased the hops of one Elwood, a large and experienced hop-grower, for the price of 12½ cents per pound; and that relying upon such representation, and believing the truth thereof, and having confidence in the prudence and judgment of Elwood, the defendant entered into the agreement. That hops were at that time worth more than 12½ cents per pound; that such representations were false and fraudulent, and made with the intent to deceive and defraud the defendant. It is now urged that it was the folly of the defendant that he relied upon these representations; that it was his duty to have made inquiry of Elwood to have ascertained the truth of the representations before he entered into the contract. In other words, the defendant should have assumed that Wood's statements, if not untrue, were at least doubtful, and that he is to suffer for giving them credence, while the party knowingly making the false representation, is to reap the fruits of his fraud, because the party dealing with him did not distrust him. It was well observed by the court in *Van Epps* vs. *Harrison*, 5 Hill 63, that the credulity of the defendant furnishes but a poor excuse for the falsehood and fraud of the plaintiff, and the latter will have no just ground of complaint if he is held responsible for his misconduct. That was an action upon a bond given upon a sale of land by the plaintiff to the defendant, and, as a defence to the action, the defendant set up that the plaintiff falsely and fraudulently represented to him that he had just purchased and paid $32,000 for the land, when in truth he had paid but $16,000; and the court were of the opinion that the false affirmation concerning the price paid for the land furnished a good defence to the action.

It is true, as contended by the counsel for the appellant, that

the fraud which will vitiate a contract must be material, and that it must relate distinctly and directly to the contract, and must affect its very essence and substance. Parsons, in his work on Contracts (2 Parsons 267), observes that there is no positive standard by which to determine whether the fraud be thus material or not, but that no better rule for deciding the question can be given than this: "If the fraud be such that had it not been practised, the contract would not have been made, or the transaction completed, then it is material to it." Applying this rule to the case at bar, in the aspect we are now considering it, the materiality of the representation is placed beyond all question. The defendant says, that being ignorant himself of the value of hops, and knowing the prudence and judgment of Elwood, he, in reliance on the representation that Elwood had sold his hops to Wood at the price named, entered into the contract to sell his hops to him at the same price. Whatever state of facts would enable a party to avoid a contract, is equally available to enable him to defeat one sought to be enforced against him. Could this defendant therefore have sought the aid of a court of equity upon the facts stated in his answer, to set aside this contract? The authorities are abundant to show that he could. In *Daggett* vs. *Emerson*, 3 Story Rep. 733, Mr. Justice STORY states the principles by which courts of equity are to be governed in such cases, in the following elegant and forcible terms, and these observations have peculiar force and significance as applicable to the present case. He says, "It is equally promotive of sound morals, fair dealings, and public justice and policy, that every vendor should distinctly comprehend not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberrima fides*, in every representation made by him, as an inducement to the sale. He should literally in his representations tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable, and it is usually immaterial whether the representation be wilfully and designedly false or ignorantly and negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters, or proclaims, or knowingly impresses upon the vendee, as a lure or decisive motive for the bargain."

In *Taylor* vs. *Fleet*, 1 Barb. 471, the vendee sought the aid of a court of equity to set aside a conveyance and sale of real estate, on the ground that the vendor had made a representation in regard to the land which was untrue, and the court held that the vendee having ascertained that the representation was untrue, had the right to rescind the contract. That whatever may have been the motive of the vendor in making an erroneous representation respecting the land about to be sold by him, it is enough to entitle the purchaser to relief that there was a misrepresentation of a matter of fact material to the subject of negotiation, and which constituted the very basis of the contract. The court said, "The representation being untrue and influential, vitiated the transaction, whether such representation was wilfully and designedly false or ignorantly or negligently untrue." See also opinion of Mr. Justice WOODBURY, 9 Law Reporter 160, *Warner* vs. *Daniels*; Story's Eq. Juris. § 192, 193; *Hugh* vs. *Richardson*, 3 Story Rep. 659; *Bennett* vs. *Judson*, 21 N. Y. 238. In *Neville* vs. *Wilkinson*, 1 Bro. Ch. Rep. 546, Lord Chancellor THURLOW said: "It has been said here is no evidence of actual fraud in R., but only a combination to defraud him. A court of justice would make itself ridiculous if it permitted such a distinction. Misrepresentation of circumstances is admitted, and there is positively a deception." And he added: "If a man upon a treaty for any contract, will make a false representation by means of which he puts the party bargaining under a mistake upon the terms of the bargain, it is a fraud. It misleads the party contracting on the subject of the contract." In harmony with the doctrine of these cases are the principles laid down by this court in *Valton* vs. *National Fund Life Ins. Co.*, 20 N. Y. R. 32. It was there decided that fraudulent representations made by the assured to the insurer, upon his application for a policy, though not material to the risk, yet material in the judgment of the insurer, and which induced him to take the risk, would avoid the policy. And this court held that a misrepresentation, although it did not affect the nature of the risk, yet was a fraud because it induced a confidence without which the party would not have acted. This principle covers the whole ground in controversy in the present action, and if applicable to the present case is decisive of it. But it is urged by the appellant's counsel, that the law of contracts of insurance and contracts of sale are different and rest on different principles. That

the parties do not deal in the former case on the presumption of equal knowledge and vigilance as to the subject-matter of the contract, and that hence a different rule of law prevails. It is true that in contracts of insurance, all representations material to the risk, if untrue, avoid the policy, but representations not material rest on the ground of fraud, and therefore vitiate the policy on that ground. This distinction was urged upon the court in the case of *Moens* vs. *Heyworth*, 10 Meeson & Welsby 147. In that case the question was whether a contract for the sale of coffee, which was represented to be invoiced to the sellers, was void from the fact that such representations were untrue, and it was held that it was. Lord ABINGER, Chief Baron, said: "The fraud which vitiates a contract and gives the party a right to recover, does not in all cases necessarily imply moral turpitude. There may be a misrepresentation as to the facts stated in the contract, all the circumstances to which the party may believe to be true. In policies of insurance, for instance, if an insurer makes a misrepresentation, it vitiates the contract. Such contracts it is true are of a peculiar nature, and have relation as well to the rights of the parties as to the event. In the case of a contract for the sale of a public-house, if the seller represent by mistake that the house realized more than in fact it did, he would be defrauding the purchaser and deceiving him, but that might arise from his not having kept proper books or from non-attention to his affairs; yet as soon as the other party discovers it, an action may be maintained for the loss consequent upon such misrepresentation, inasmuch as he was thereby induced to give more than the house was worth. And he further observed, that the question of fact, whether there was fraud or not, ought to be decided by the jury from the circumstances of the case. PARKE, Baron, remarked: The case of a policy of insurance does not appear to me to be analogous to the present; those instruments are made upon an implied contract between the parties, that everything material known to the assured should be disclosed by them. This is the basis on which the contract proceeds, and it is material to see that it is not obtained by means of untrue representation or concealment in any respect. In this case, he says, the plaintiffs must prove a representation by words or acts of that as true which was known to the defendants to be untrue, as in the cases of *Polhill* vs. *Walter*, 3 B. & Adol. 114, and *Foster* vs. *Charles*, 6 Bing. 696. In the former case Lord

TENTERDEN laid down the rule, that it is not necessary to prove that the false representation was made from a corrupt motive of gain to the party making it, or a wicked motive of injury to the other party. It was enough if a representation is made, which the party making it knows to be untrue, and which is intended by him, or which, from the mode in which it is made, is calculated to induce another to act on the faith of it, in such a way that he may incur damage, and that damage is actually incurred. In *Foster* vs. *Charles* the same doctrine is reiterated, and PARKE, J., quotes with approbation the remark of CHAMBRE, J., in *Tapp* vs. *Lee*, 3 Bos. & P. 371, that it would be an absurdity in law to hold that if a man draws another into a snare, the party suffering should have no remedy by action. It is perfectly clear, therefore, from principle and authority, that if the plaintiff had demurred to the second ground of defence contained in the defendant's answer, as not sufficient in law, the demurrer would have been overruled and judgment given for the defendant. The judge therefore properly refused to strike out the second ground of defence as stated in the answer. He also properly refused to strike out the testimony which the defendant had adduced to sustain that answer, except the allegation that hops were, at the time the defendant made the contract, worth more than twelve and one-half cents per pound. Such fact had no materiality in excusing the plaintiff's assignor from the fraud practised upon the defendant. *Non constat* that the defendant would not have entered into the contract if he had known that circumstance. The question here is, whether a contract obtained from a person by fraud and falsehood can be enforced against him by the party procuring it. I think clearly it cannot. It is undeniable that if it could have been enforced, or if the defendant had fulfilled it, he would sustain thereby great damage, and it is no answer for the plaintiff to say that the defendant might on that day have sold his hops either to Wood or some one else for the same price if the fraud had not been practised. The defendant was at liberty to refuse to fulfil the contract on his part as soon as he ascertained the fraud practised upon him, and the law will not subject him to the damages which the plaintiff or his assignee may have sustained from their inability to realize the fruits of their fraudulent acts. The motion to strike out the defendant's testimony was therefore properly denied.

The evidence of the belief of the defendant in the representa-

tion made by Wood was perfectly proper. It cannot be permitted to the plaintiff to object that the defendant credited the statement of his assignor. The defendant was not to assume it was untrue, and the law would have assumed that he gave credit to the representation whether he had so testified to it or not. But this objection is wholly immaterial, as the defendant testified without objection, that he entered into the contract relying upon that representation, namely, the representation that he, Wood, had purchased Elwood's hops. This shows beyond all controversy, that he believed the representation to be true, and his statement that he so believed it, was of no importance. The judgment appealed from should be affirmed.

Concur, C. J. DENIO, JJ. MULLIN, HOGEBOOM, INGRAHAM, SELDEN.

RECENT ENGLISH DECISIONS.

Court of Common Pleas.

HANCOCK, ASSIGNEE, *vs.* AUSTIN.

By an agreement between A. and B., A. agreed to pay B. 12*s.* a week for the use of standing room and steam-power for certain machinery belonging to A., in a room the property of B., and to which B. had access to oil the machinery. B., in the absence of A., who had locked his room, unfastened the window, entered, and distrained the machines for rent: *Held*, that trover lay for the conversion of the machines, for there was no distrainable rent issuing out of the standing ground, and that if the whole room was demised, then the entry was unlawful.

This was an action tried before ERLE, C. J., at the Derbyshire Summer Assizes, 1862. The declaration contained a count in trover, and also a count for excessive distress. The defendant pleaded not guilty, by statute 11 Geo. 2, c. 19, § 21. The plaintiff sued as assignee of one Needham, a bankrupt, who occupied a room in a factory belonging to the defendant, in which room he had placed three lace machines, worked by steam-power supplied to them by an engine of the defendant's factory. "For the standing and steam-power for the said machines," Needham agreed to pay 12*s.* a week. The defendant had a right to enter this room for the purpose of oiling his machinery. Previously to his insolvency Needham went out, leaving his door locked, and